No. 82-1721

In The
Supreme Court of the United States
October Term, 1983

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN McCOY and KAREN McCOY,

Petitioners,

vs.

KEITH MILTON RHINEHART, a single person; The AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the defendants waive their right to contest the constitutional validity of the protective order by agreeing to the entry of a protective order?

2. Do the first amendment rights of religious freedom, association, privacy and access to the court system prevent the State from forcing the Aquarian Foundation to expose to public scrutiny the names of its members and donors?

3. Should a protective order be evaluated under the balancing test previously adopted by this Court to evaluate the restrictions on first amendment rights where the State has a legitimate purpose unrelated to the suppression of expression?

4. Does the good cause standard of Washington's Civil Rule 26(c) sufficiently protect any first amendment rights implicated in discovery?

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BRIEF OF THE RESPONDENTS

The respondents respectfully ask this court to affirm the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on December 2, 1982.

STATEMENT OF THE CASE

A. Defendant Seattle Times Published a Series of Articles Ridiculing The Aquarian Foundation, Reverend Rhinehart, and Other Members of the Foundation.

Plaintiffs the Aquarian Foundation,[1] its spiritual leader Reverend Keith Milton Rhinehart, and five women members of the Foundation brought this action for defamation and invasion of privacy against defendants Seattle Times, The Walla Walla Union-Bulletin and three reporters. The case comes to this court on certiorari to the Washington Supreme Court, which granted interlocutory review of discovery orders. This brief accepts as true the allegations of the sworn complaint and affidavits, which are not controverted.

The Aquarian Foundation is a Spiritualist Church founded in 1955 which holds regular weekly services in Seattle and other cities. (CP 489, 499, 516-17)[2] The Aquarian Foundation is a minority church; it has less than 1,000 members and many of its religious beliefs are unpopular. (JA 81a-82a)

The Aquarian Foundation, like most religions, is predominantly concerned with the promotion of moral values and ethical conduct. The beliefs of the Foundation include belief in spiritual and paranormal phenomena.

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[1]The Aquarian Foundation is a Washington not-for-profit corporation which has no parent company, subsidiary, or affiliate. (Sup. Ct. R. 28.1)

[2]This brief follows the abbreviations for the record adopted by the petitioners: "JA" (Joint Appendix); "CP" (Clerk's Papers); "SCP" (Supplemental Clerk's Papers); and "SSCP" (Second Supplemental Clerk's Papers). The Brief of the Petitioners is abbreviated as "PET BR", and the Brief of Amici Curiae as "AC BR".

The Foundation, as a Spiritualist religion, believes in survival beyond death, and the ability to communicate with deceased persons through a medium. The Foundation also believes that some persons have the ability to act as a medium for various kinds of physical phenomena, including the transfer of objects from one place or time to the present time and in the presence of the medium. Reverend Rhinehart, as the spiritual founder of the Foundation, has been its primary mental and physical medium.

The Aquarian Foundation held a religious service for approximately 800 inmates at the Washington State Penitentiary at Walla Walla in February 1978. A church choir, composed of church members, sang as part of the service. (JA 6a) The five women plaintiffs in this action were all members of the Foundation and some sang in the choir. (JA 5a) Three of the women are married, most are mothers. (*Id.*)

The religious service at Walla Walla triggered a campaign by defendants Seattle Times and Walla Walla Union-Bulletin to discredit Reverend Rhinehart, the Aquarian Foundation, and its members. Over the next 19 months, the Seattle Times published five articles ridiculing Reverend Rhinehart, the Foundation and all its members. (JA 4a)

Reverend Rhinehart and the women who had sung in the choir were humiliated when the Seattle Times falsely reported that the women had stripped off all their clothes and had wantonly danced naked exposing their genitalia before approximately 800 male prisoners. (JA 25a) The Seattle Times falsely implied that the Aquarian Foundation is a Jim Jones-like "cult", that Reverend Rhinehart

"play(s) at spiritualism," and that Reverend Rhinehart consciously defrauds his followers and supporters. (JA 7a) On another occasion, the Seattle Times falsely reported that television superhero Lou Ferrigno, the "Incredible Hulk," who represents to millions of people a symbol of good who battles against and triumphs over evil, so feared Reverend Rhinehart that he positioned his father in the audience during a sermon with a gun ready to blow Reverend Rhinehart's head off if anything happened to Lou Ferrigno. (JA 7a) The Seattle Times also falsely implied that Reverend Rhinehart's 1965 infirm conviction for private consensual adult sodomy was overturned on a mere technicality proffered by high priced attorneys during a "long and expensive legal battle." (JA 8a) The truth is that Reverend Rhinehart's erroneous conviction was vacated "on the overwhelming evidence showing that the State of Washington had knowingly used perjured testimony in order to obtain the original conviction." (CP 453)

Reverend Rhinehart, the Aquarian Foundation and the five women members filed this action seeking redress for the Seattle Times' repeated defamations.

B. Counsel For The Seattle Times Agreed To The Entry Of A Protective Order.

The Seattle Times immediately embarked upon an ambitious program of pretrial discovery, which Reverend Rhinehart and the Aquarian Foundation naturally assumed to have been undertaken for purposes of litigation. The Seattle Times asked Reverend Rhinehart to produce all of the following documents prepared by him within the past ten years: United States income tax returns; financial statements; all documents which evidence

gifts and donations from any source; all financial statements prepared for the Aquarian Foundation; and all documents which evidence all assets and liabilities possessed by Reverend Rhinehart. (CP 730-35) The Seattle Times also set depositions of every plaintiff. (CP 742-44)

The Seattle Times deposed Reverend Rhinehart on June 10, 1980. The deposition opened with a discussion by counsel of documents to be produced. Reverend Rhinehart objected to the production of income tax returns and asked whether information given in discovery could be published by the defendants: "Does that mean the reporters can publish all that?" (Rhinehart Dep., p. 6) Reverend Rhinehart was reluctant to turn over the documents without a court order. Counsel for defendant Seattle Times stated:

> MR. SCHWAB: I am willing to agree that we can have protective orders concerning personal financial data which would make it impossible for anyone to publish that.

(Rhinehart Dep., p. 6)

Later in the deposition, the Aquarian Foundation's attorney asked, "All financical information is subject to our agreement [that it is not to be published]?" (Rhinehart Dep., p. 21) The attorney for the Times agreed, and explained to his client:

> MR. SCHWAB: It is very common in lawsuits, Erik [defendant Erik Lacitis, the reporter who wrote several articles defaming the plaintiffs], to have financial information subject to protective order. It means it can be used only in the case.
>
> We will agree financial information that we obtain through discovery in this case from you or the Foun-

> dation is only to be used in this case and at trial. Our clients can see it because they are our clients. You have sued them and they work with us. I am sure we will agree that this is not to be published. We don't want the newspaper then publishing your financial affairs.

As a result of these assurances, the defendants were provided with income tax returns of Reverend Rhinehart and other financial information relating to all of the other plaintiffs. In addition, the plaintiffs produced for the defendants documents which literally filled an entire room. (CP 341)

C. The Trial Court Ordered The Aquarian Foundation And Reverend Rhinehart To Divulge The Names Of All Persons Who Had Made Donations To Them.

The Seattle Times next served wide-ranging interrogatories on each of the plaintiffs.[3] The interrogatories included a substantial number of questions relating to the financial circumstances of the parties, the names of donors to the Foundation and to the parties, specific information about each person's donations, and the names or addresses of members of the church over the last ten years. (CP 442-531)

The Aquarian Foundation and Reverend Rhinehart refused to reveal the identity of members of the Aquarian Foundation on the ground that the identity of the

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[3]The Seattle Times argues that discovery of financial information was supported by an affidavit showing that Reverend Rhinehart was using church contributions for his personal benefit. (PET BR 7) The affidavit speculates that a particular property "may well refer" to property owned by Reverend Rhinehart. (CP 131) This was false (CP 120) and the defendants' continued reliance on unfounded speculation is improper.

members is protected from discovery by the constitutional rights of each member to privacy, freedom of religion and freedom of association. (CP 475, 515) The Foundation also refused to list all donors, because "by revealing names and addresses of donors the defendants would have access to names of all members." (CP 512)

The trial court ordered the Aquarian Foundation and Reverend Rhinehart to identify all donors. (JA 59a-60a) The court did not immediately order the Foundation to identify all members, but instead extended to the Foundation the option of providing the information on which the plaintiffs will rely to prove a claim of diminished membership. (JA 68a-69a, 72a)

The Aquarian Foundation stated in a supplemental answer that it did not have detailed information of dates and amounts or circumstances of every gift by donor. The Foundation also objected that revealing the information they did have would violate a pledge of secrecy made to the donors, and would violate the members' rights to privacy, freedom of religion and freedom of association. (SSCP 74-76) Privacy is a fundamental tenet of the Foundation's beliefs, and compelled disclosure would violate this doctrine. (*Id.*) Rather than provide the names of members, the Foundation estimated the total number of members for each calendar quarter by dividing the total dollar amount of membership dues collected by the amount of the dues for each member. (*Id.*)

The trial court considered the supplemental answers and ordered the Aquarian Foundation and Reverend Rhinehart to identify any donors during the five years preceding the date of the complaint. (JA 59a-60a) The

trial court declined at that time to order either the Foundation or Reverend Rhinehart to directly identify all members. However, the order to reveal the names of donors and their contributions amounted to an order to reveal the membership since each member makes a membership donation and the overwhelming majority of donors are members. (CP 512)

D. The Plaintiffs Moved For A Protective Order.

Reverend Rhinehart and the Foundation sought a broad protective order to preserve the privacy of the members and donors of the Foundation. Reverend Rhinehart and the Foundation had learned that the Seattle Times or its counsel had been providing information to third parties for purposes of instituting lawsuits against the Foundation. (CP 127-28) Reverend Rhinehart and the Foundation were further startled to learn that the Seattle Times vehemently resisted any protective order (CP 325-34) despite its own counsel's previous agreement to enter a protective order.

The trial court initially denied the plaintiffs' request for a general protective order. The trial court relied on *In re Halkin*, 598 F. 2d 176 (D. C. Cir. 1979), which required a specific factual showing which went beyond mere conclusory allegations, "to justify imposition of a protective order which would have had the effect of imposing prior restraint on the freedom of speech and of the press guaranteed by the first amendment." (JA 79a) The trial court stated that the plaintiffs could renew their motion for a protective order "in respect to specifically described discovery materials [on] a factual showing of good cause for restraining defendants in their use of those materials." (*Id.*)

After the trial court's ruling, the plaintiffs filed affidavits to prove the need to protect the names and addresses of the members of the Aquarian Foundation.[4] The plaintiffs had previously filed the affidavits of Keith Milton Rhinehart and of counsel stating that anonymous persons had threatened Reverend Rhinehart with violence on a number of occasions after the Seattle Times published the defamatory articles, and that the Seattle Police Department had advised Reverend Rhinehart to keep his residence a closely guarded secret. (SCP 36-39)

The additional affidavits filed by the Foundation show that the Foundation will lose members and donors if their identities are publicized, and that potential members and donors will be deterred from joining or supporting the church. An affidavit from the Secretary of the Foundation explained that publicity about the Aquarian Foundation had subjected her, her husband and five year old daughter to unbearable psychological pressure and physical danger, forcing her to resign her position. (JA 43a) Another affidavit showed that the members fear economic reprisal and harassment if the public learns of their link with the Foundation:

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[4]Petitioner Seattle Times erroneously states in the chronological list of relevant docket entries that the affidavits of Roberte Plante and Catherine Harold were not filed with the trial court until November 25, 1981, several months after the entry of the discovery order and the protective order. (JA 2) The trial court's docket shows that both affidavits were originally filed on April 8, 1981 and were assigned docket numbers. Indeed, the protective order recites that the trial court considered these affidavits in entering the protective order. (JA 64a) These pleadings disappeared from the court file, and duplicate copies were filed in November 1981 with the trial court's approval.

> Since I have been a member of the Aquarian Foundation, Foundation members have always assumed their names and the amount of their contributions would remain confidential.
>
> Members were also assured by Foundation representatives that their names and the amount of their contributions would remain confidential. The members desire confidentiality because they are afraid of losing their jobs, disinheritance, and other economic reprisals.

(JA 45a) The harassment and vilification had even then taken their toll, reducing the number of worshippers at the Foundation. (JA 48a)

The members' fears of reprisal and harassment were well-founded. Robert Plante, an employee of the Foundation, was the victim of a series of life-threatening incidents at the Seattle church after defendant Seattle Times and defendant Walla Walla Union-Bulletin published articles about the Foundation. These incidents so terrorized Mr. Plante that he was forced to leave Seattle. (JA 94a)

Mr. Plante witnessed a series of telephone threats, bomb threats, an assault on an elderly female member, a bombing of the church, and an assault with a shotgun. Mr. Plante explained that, "Every time [defendant] Erik Lacitis would write an article in the Seattle Times in reference to the Aquarian Foundation, more of these threats would begin to filter into the church . . . ." (JA 97a) Four other members of the Foundation filed similar affidavits. (JA 43a-50a, 83a-93a)

E. The Trial Court Restricted The Use Of Information Learned Through Discovery Regarding Financial Affairs And Names Of Donors.

The trial court concluded that the members' affidavits established "reasonable grounds for the issuance of a protective order."[5] (JA 65a) The preamble of the protective order recites that, "the absence of protective orders would have a chilling effect on a person's willingness to bring a case to court and that this would have the effect of denying persons access to the courts. . . ." (JA 64a)

The protective order entered by the trial court is reprinted in its entirety at Appendix A to this brief. It is a narrowly drawn restriction on the use by the defendant of certain limited classes of information. The protective order applies only to information gained through discovery regarding "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs." (JA 65a)

The protective order was consciously drawn to preserve the defendants' right to publish anything defendants may wish to publish from a source other than court-compelled discovery:

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[5]Amici curiae argue that the protective order was not premised in any way upon the constitutional rights of the members and donors, pointing out that the trial court struck from the proposed order the statement that the court considered plaintiff's arguments "with respect to the rights of plaintiffs and members of the Aquarian Foundation to freedom of association and religion and to rights of privacy. . . ." (JA 64a, AC BR 19 n. 9) Amicus misreads the order. As entered, the order states that the court has read the affidavits of the members of the Foundation and has considered *all* of "the positions advanced by plaintiffs." (JA 64a) The trial court struck the specific language to emphasize that its decision was based on all of plaintiff's positions, and was not limited to the enumerated arguments of plaintiff which had been listed in the order.

> This protective order has no application except to information gained by the defendants through the use of the discovery processes.

(JA 65a) The only limitation imposed on the defendants is that any information which they obtain solely as a result of discovery shall be used by them only for the purposes to be served by that discovery, that is, "for the discovering party to prepare and try the case." (JA 65a)

Considering the narrow scope of the protective order, the defendants and amici curiae resort to remarkable hyperbole in describing it. The order does not constitute "unprecedented injunctive relief for defamation" or "judicial assistance in enjoining a libel." (PET BR 9, 20) Nor does this order have the effect of "halting much of the newspaper commentary at the outset of the lawsuit", silencing one side of the discussion while leaving the other free to speak. (*Id.* at 13, 19; AC BR 18) The protective order does not in any way prohibit the Seattle Times from further defaming Reverend Rhinehart and the Aquarian Foundation. The Times is as free after the order to defame Reverend Rhinehart and the Foundation as it was before the entry of the order. The sole effect of the order is to prevent the Seattle Times from extracting information through the discovery process, and then using that court-compelled information for a purpose unrelated to the defense of the lawsuit.

The Seattle Times complains that, "the order contains no provision concerning its duration or its application to materials available in public records or revealed in open court." (PET BR 8) To the extent that this complaint was ever valid, the Washington Supreme Court cured any infirmity in the order by holding that Reverend Rhinehart

and the Aquarian Foundation are entitled to the protections of the court only until "the fruits of the discovery are made public through the judicial process (or by the plaintiffs or others independently of discovery). . . ." (JA 131a) The Washington Supreme Court also directed the Seattle Times to apply to the trial court for clarification that the order does not prohibit publication of discovery information later revealed in open court. (*Id.* at n. 9)

F. The Washington Supreme Court Granted Interlocutory Review And Affirmed Both The Protective Order And The Discovery Order.

Both sides sought interlocutory review by the Washington Supreme Court, the plaintiffs of the discovery order and the defendants of the protective order. The Washington Supreme Court granted review and affirmed both orders. No further proceedings have occurred in the trial court, because the discovery order provides that no discovery should take place until the completion of the interlocutory review of the protective order. (JA 62a-63a) The only effect of the protective order to date has been to enforce judicially the stipulation by counsel for the Seattle Times to agree to a protective order.

SUMMARY OF ARGUMENT

Litigants do not surrender their first amendment rights at the courthouse door. The first amendment guarantees to Reverend Rhinehart and the members and donors of the Aquarian Foundation the right to associate freely and to worship as they choose, free of government interfer-

ence. Each member and donor has the right to maintain his or her anonymity, and to support privately the beliefs and work of the Aquarian Foundation, without answering to the State or anyone else in this matter of conscience. The privacy of the members and donors of this beleaguered church must be guarded with particular care, because the church, its spiritual leaders and its members have been the targets of harassment, violence and threats. The most damaging harassment has come from the defendants, who include the Seattle Times, the major newspaper in the Seattle metropolitan area, which has a wide distribution throughout the State of Washington.

The first amendment prevents the State from tearing away the cloak of confidentiality which protects the Foundation's members and donors unless the loss of confidentiality is necessitated by the most compelling circumstances and there exists no less restrictive alternative to total disclosure. Assuming that disclosure of the identities of the members and donors of the Aquarian Foundation is necessary for discovery purposes, the impact of disclosure must be minimized by limiting dissemination of this information by prohibiting the defendants from using the information for any purpose other than preparation for and conduct of trial.

The defendants argue that they have a significant first amendment interest in publicly disseminating the identities of the members and donors of the Aquarian Foundation. Assuming such an interest exists, it must be balanced against the constitutional rights of the members and donors of the Foundation. The balance must be struck in favor of confidentiality. Dissemination of this information would result in substantial and serious injury, for it would

expose members of the Foundation to harassment and physical danger, and would deter present and future members from freely exercising their rights to associate and worship with the Aquarian Foundation. The protective order here is narrowly drawn. It extends only to confidential financial information and the identities of members and donors. Short of denying discovery, there is no alternative means of protecting the rights of the members and donors of the Foundation.

The Washington Supreme Court held that protective orders should be evaluated under the good cause standard of Washington's Civil Rule 26(c). The Seattle Times urges this Court to reject the good cause standard and hold that protective orders should be evaluated under a "close scrutiny" standard. The Court need not choose between these competing standards under the facts of this case. The members and donors of the Aquarian Foundation have a substantial first amendment interest in maintaining the confidentiality of the information sought by the Seattle Times, and the protective order should be evaluated under a balancing test. In any event, this protective order satisfies even the "close scrutiny" test proposed by the Seattle Times. It should be affirmed under any standard this Court might adopt.

Protective orders are necessary to protect the rights of all citizens to seek judicial redress for injury without fear of totally surrendering their privacy. The Court should adopt a standard for protective orders which will ensure the integrity and fairness of the judicial system, for without an effective judiciary no constitutional right is adequately protected.

ARGUMENT

I.

Defendant Seattle Times Has Waived Any Rights To Object To The Protective Order By Agreeing That A Protective Order Should Be Entered.

Counsel for the Seattle Times agreed during Reverend Rhinehart's deposition to the entry of a protective order restricting the use of any financial information obtained through discovery. Reverend Rhinehart produced certain financial information, secure in the knowledge that the Seattle Times had already agreed to the entry of a protective order. The Seattle Times cannot now renege on the agreement of its own counsel and challenge the propriety of the order.

A party may waive first amendment rights. *Curtis Publishing Company v. Butts,* 388 U. S. 130, 145 (1967). *Cf. Snepp v. United States,* 444 U. S. 507 (1980) (enforcing a confidentiality agreement signed by defendant as a condition of employment with the CIA). Lower courts have consistently held that a party who agrees to the entry of a protective order may not later contest the order and seek to disseminate information disclosed under the terms of the order. *Martindell v. International Tel. and Tel. Corp.,* 594 F. 2d 291, 298 (2d Cir. 1979); *Nat'l Polymer Prod. Inc. v. Borg-Warner Corp.,* 641 F. 2d 418, 423-24 (6th Cir. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.,* 529 F. Supp. 866, 894 (E.D. Pa. 1981); *GAF Corp. v. Eastman-Kodak Co.,* 415 F. Supp. 129 (S.D.N.Y. 1976).

The defendants clearly and explicitly agreed to the entry of a protective through their counsel of record, who

is also counsel of record in this Court. Counsel explained at the time to defendant Erik Lacitis that, "It is very common in lawsuits, Erik, to have financial information subject to protective order." The defendants' present position is an anomalous about-face which would unfairly prejudice Reverend Rhinehart, the Foundation, and the members and donors. This Court should hold that the defendants have waived any right to contest the protective order.

II.

The First Amendment Rights Of Religious Freedom, Association, Privacy And Access To The Court System Prevent The State From Forcing The Aquarian Foundation To Expose To Public Scrutiny The Names Of Its Members And Donors.

A. The Discovery Order Infringes Upon The Members' and Donors' Rights To Religious Freedom, Free Association, Privacy And Access To The Court System.

Reverend Rhinehart and the Foundation have filed a companion petition for certiorari arguing that the discovery order in this case unconstitutionally infringes upon the first amendment rights of the members and donors of the Foundation. *Rhinehart, et al. v. Seattle Times, et al.*, No. 82-1758. This Court has not yet acted on that petition and we will not here argue the issues presented by that petition. However, the protective order was devised to protect the first amendment rights of Reverend Rhinehart and the members and donors of the Aquarian Foundation, and analysis of the protective order must begin with those rights.

The members of the Aquarian Foundation have a right to associate with one another to further their personal beliefs. *Healy v. James,* 408 U.S. 169, 181 (1972); *NAACP v. Button,* 371 U.S. 415, 430 (1963); *NAACP v. Alabama,* 357 U.S. 449 (1958). Compelled disclosure of membership in an organization infringes upon this right of association. *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963); *Shelton v. Tucker,* 364 U.S. 479 (1960). Disclosure of the financial supporters of an organization similarly infringes upon first amendment rights of association. *Buckley v. Valeo,* 424 U.S. 1, 66 (1975).

In *Buckley v. Valeo,* this Court pointed out that disclosure can be particularly devastating to a minority or unpopular organization, and that the first amendment might prohibit disclosure entirely where such an organization could establish a real possibility of reprisal following disclosure. 424 U.S. at 71-72. More recently, the Court held in *Brown v. Socialist Workers Party,* 103 S.Ct. 416 (1982), that the state could not compel disclosure of the names of contributors to a minority party which had shown "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either government officials or private parties." 103 S.Ct. at 420-21 (quoting from *Buckley v. Valeo,* 424 U.S. at 74).

The record in this case is replete with evidence that the Aquarian Foundation is a minority religion with beliefs scorned by a substantial number of people, as evidenced by the death threats and other violent incidents at the Mother Church in Seattle. Like the Socialist Workers Party, the members and donors of the Foundation are

entitled to heightened protection of their rights of free association.

Disclosure of membership and financial donors to a church also encroaches upon the first amendment right to freely exercise one's religious beliefs. *Surinach v. Pesquera de Busquets,* 604 F. 2d 73 (1st Cir. 1979); *Cf. Church of Hakeem, Inc. v. Superior Court,* 110 Cal. App. 384, 168 Cal. Rptr. 13 (1980). The infringement upon the free exercise clause is aggravated when the very act of disclosure constitutes a violation of a religious belief or practice, as in this case. (SSCP 74-76) *Scott v. Rosenberg,* 702 F. 2d 1263, 1273 (9th Cir. 1983), *petitions for cert. filed,* 52 U. S. L. W. 3314 (U. S., Sept. 1, 1983) (No. 83-373), 52 U. S. L. W. 3294 (U. S., Oct. 3, 1983) (No. 83-570).

Compelled disclosure of the members and donors of the Aquarian Foundation would violate yet another first amendment right of the members and donors, their first amendment right to privacy, the right to be let alone. *Griswold v. Connecticut,* 381 U. S. 479 (1965). The members and donors of the Foundation have a constitutional right to maintain their anonymity, silently to support the beliefs they hold most precious. *Brown v. Socialist Workers,* 103 S. Ct. at 420; *NAACP v. Alabama,* 357 U. S. at 463. *See also Talley v. California,* 362 U. S. 60 (1959). The Washington Supreme Court in this case recognized the importance of the members' and donors' rights to privacy and stressed the need to protect a litigant's privacy against unnecessary abuse through the discovery process. (JA 116a-117a)

Reverend Rhinehart and the Aquarian Foundation also have the fundamental right to bring their grievances

before the courts of the State of Washington for peaceful adjudication. *See In re Primus,* 436 U. S. 412 (1978); *NAACP v. Button,* 371 U. S. 415 (1963). Compelled discovery of the identities of members and donors in the Aquarian Foundation would burden this fundamental right of access to the courts by requiring Reverend Rhinehart either to compromise rights of association, privacy and religion, or to abandon any hope for judicial redress of the indignities inflicted on him and his congregation by the Seattle Times. Reverend Rhinehart and the Aquarian Foundation should not be forced to abandon this action entirely in order to protect the members and donors.

B. The First Amendment Requires The State To Minimize The Violation Of The First Amendment Rights Of The Members And Donors By Strictly Limiting The Dissemination Of The Discovered Information.

The State of Washington has infringed the first amendment rights of Reverend Rhinehart, the Aquarian Foundation and the members and donors by ordering disclosure of the identities of the members and donors. Assuming that the discovery order is valid, the State must still minimize its infringement upon these rights. The State's infringement must be narrowly tailored to the State's purposes in ordering disclosure. The first amendment requires that the State limit dissemination of the discovered information to counsel and the parties by entering the protective order.

Any infringement upon first amendment freedoms must be narrowly tailored to achieve governmental objectives, in order to minimize the State impact on fundamental personal liberties. *Larson v. Valente,* 456 U. S.

228 (1982); *Shelton v. Tucker,* 364 U. S. 479, 488 (1960); *Britt v. Superior Court,* 20 Cal. 3d 844, 143 Cal. Rptr. 695, 702 (1978). The Washington Supreme Court recognized this important principle in this case. The court pointed out that discovery orders require a party "to give information about himself which he would otherwise have no obligation to disclose." (JA 110a) The Washington court recognized that the discovery order encroaches upon first amendment rights of these plaintiffs, and that the court should make every effort to protect these rights insofar as possible. (JA 112a-113a)

Scrupulous protection of the first amendment rights of the members and donors of the Foundation is particularly important in light of the unpopularity of the Foundation and its beliefs. The beliefs of the Aquarians may be neither popular nor widely accepted, but, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit first amendment protection." *Thomas v. Review Board,* 450 U. S. 707, 714 (1981). Indeed, our courts have protected most scrupulously the first amendment rights of unpopular groups. *See* Note, *The Constitutional Right To Anonymity: Free Speech, Disclosure and the Devil,* 70 Yale L. J. 1084, 1108-09 (1961) ("[I]t is the rebel and the heretic for whom, to a large degree, the first amendment protections were forged."). Although the Seattle Times and similar publications have chosen to attack the Aquarian Foundation, the State cannot be a party to the Seattle Times' efforts to quench the small flame of faith guarded by Reverend Rhinehart and the Aquarian Foundation. The State must minimize the impact of disclosure of the names of members and donors through the protective order.

III.

The First Amendment Rights Of The Aquarian Foundation's Members And Donors Must Be Balanced Against And Accommodated With The First Amendment Rights of the Seattle Times.

A. Freedom Of Speech And Press Cannot Be Preferred Over Any Other First Amendment Freedom.

First amendment freedoms are at stake on both sides of this case. The discovery order infringes upon the first amendment rights of Reverend Rhinehart, the Aquarian Foundation and the members and donors, but the protective order also implicates the first amendment interests of the defendants. Neither side has absolute first amendment freedoms, and the State cannot prefer the first amendment rights of either party to those of the other. An accommodation of the rights of all parties must emerge from this collision of first amendment rights. The arguments of defendants and amici curiae are fatally flawed by their failure even to consider the first amendment interests of Reverend Rhinehart, the Aquarian Foundation and the members and donors.

Important though it may be in our democratic society, freedom of the press is not the queen of the Bill of Rights. Indeed, freedom of the press should be regarded as the handmaiden of our other liberties, a mechanism to prevent the state from trammeling the free exercise of religion, of assembly, or redress of grievances. Reverend Rhinehart and The Aquarian Foundation believe that this Court should rank freedom of religion superior to freedom of speech and freedom of the press.

This Court has refused in the past to establish a hierarcy among first amendment freedoms. This Court un-

equivocally declined the invitation of the Nebraska Press Association to rewrite the Constitution by ranking one fundamental constitutional right superior to another:

> In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances.

Nebraska Press Association v. Stuart, 427 U. S. 539, 561 (1976). *See also Richmond Newspapers Inc. v. Virginia,* 448 U. S. 555, 578 (1980) ("the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental," quoting *DeJonge v. Oregon,* 299 U. S. 353, 364 (1937)).

The rights of the members and donors of the Aquarian Foundation to religious freedom, free association, privacy and access to the court system stand on an equal plane with the rights of the Seattle Times to freedom of the press and free speech. The court may avoid any collision between these rights by denying discovery altogether, as urged in the Aquarian Foundation's cross-petition. However, if the court orders disclosure, the rights of the members and donors collide with the rights of the Seattle Times. The resolution of this collision must accommodate the rights of both parties, for neither side's rights are superior.

The arguments advanced by defendants and amici curiae are constitutionally deficient, for they totally ignore the first amendment rights of the members and donors of the Foundation.[6] The defendants would have this Court begin and end its analysis with their first amendment rights. The defendants point this Court to the wrong starting mark. Analysis must begin by considering the first amendment interests at stake on both sides of the case.

Nowhere is the bias of defendants and amici curiae more evident than in the statement of amicus American Civil Liberties Union that its interest in this case is the promotion and defense of the fundamental personal liberties guaranteed by the Constitution of the United States: "Foremost among these liberties is freedom of speech protected by the first and fourteenth amendments." (Motion for Leave to File Brief of Amicus Curiae 2). Amicus ACLU is fundamentally wrong, for free speech and free press are in no way superior to our other rights. Indeed,

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[6]Petitioners mention the members' and donors' constitutional rights only insofar as they denigrate the members' and donors' privacy interests. (PET BR 41 and n. 23) Amici Curiae question whether public disclosure would violate any right of the members and donors. (AC BR 18-19) Both petitioners and amici ignore the uncontroverted evidence that members of the Aquarian Foundation justifiably fear publicity of their link with this oft-criticized and harassed church. Amici curiae glibly assert that nothing in the record supports the conclusion that the Aquarian Foundation "will be inhibited in aggressively litigating their claims here or, more generally, from using the courts to pursue their lawful remedies" (*Id.*), ignoring the fact that the trial court has placed Reverend Rhinehart and the Foundation in the untenable dilemma of compromising the physical safety and religious beliefs of the members and donors of the Foundation or else abandoning all hope of obtaining justice through the court system.

free speech and free press are in a very real sense not ends in themselves, but "means indispensable to the discovery and spread of political truth", *Whitney v. California,* 274 U. S. 357, 375 (1927), mechanisms to preserve a free society and to enhance other freedoms such as freedom to worship. *See* Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add To Freedom Of Speech?,* 26 Hastings L. J. 639, 653-54 (1975). Amicus curiae American Society of Newspaper Editors made a similar point when it defended public access to judicial proceedings by arguing that public access is important in order to monitor the functioning of the political system. *Report of the Press-Bar Committee, American Society of Newspaper Editors,* 18 (1964-65), quoted in Hudon, *Freedom Of The Press Versus Fair Trial: The Remedy Lies With The Courts,* 1 Val. U. L. Rev. 8, 11 (1966). But whether freedom of speech and freedom of press are means to an end or ends in themselves, surely it perverts the Bill of Rights to sacrifice freedom of religion, association and privacy to preserve inviolate freedom of the press.

B. Where First Amendment Rights Collide, The Court Must Balance The Competing Interests And Accommodate The Rights Of All Parties.

The State of Washington has caused a collision between the members' and donors' first amendment rights to freedom of religion, freedom of association and privacy, and the first amendment rights of the Seattle Times and the other defendants to freedom of the press and freedom of speech. The rights of all parties should be mutually accommodated to minimize the impact on

the rights of each. The Court should balance the rights of all parties and fairly compromise the rights of all.

This Court has repeatedly held that first amendment rights are not absolute but must be balanced against competing interests.[7] *United States v. O'Brien*, 391 U.S. 367 (1968); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968). A balancing test is appropriate in weighing the constitutional rights of the members and donors of the Aquarian Foundation against the first amendment interests of the Seattle Times. *See Zenith Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 912-13 (E.D. Pa. 1981); Note, *Rule 26c Protective Orders and the First Amendment*, 80 Col. L. Rev. 1645, 1657-58 (1980); Note, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 Duke L. J. 766, 790-91 (arguing that the balancing test is particularly appropriate because the State has a legitimate objective which is unrelated to the suppression of speech, i. e., the enhancement of full discovery to promote the search for truth in the judicial process).

The factors to apply in balancing the interests for and against a protective order should be drawn from this Court's prior restraint cases. The factors were marshalled in *In re Halkin*, 598 F. 2d 176, 191 (D.C. Cir. 1979):

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[7] In most cases, the rights of an individual collide with those of the State. In this case, the primary clash is between the rights of two private litigants, although the State has an undeniably significant interest as well in the integrity of the discovery process. (JA 130a)

> The harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression.

Similar factors were identified in *In re San Juan Star*, 662 F. 2d 108, 116 (1st Cir. 1981). Other cases have used the same factors in analyzing protective orders. *E. g., Doe v. District of Columbia*, 697 F. 2d 1115 (D. C. Cir. 1983); *Tavoulareas v. Piro*, 93 F. R. D. 24 (D.D.C. 1981); *Brink v. DaLesio*, 82 F.R.D. 664 (D. Mo. 1979); *Kuiper v. District Court*, 632 P. 2d 694 (Mont. 1981). The Seattle Times urges this Court to use these factors, although, as discussed below, the Times asks the Court to subject protective orders to "close scrutiny," not evaluate them under a balancing test.

Applying the *Halkin-San Juan Star* factors to this case, the balance is clearly struck in favor of confidentiality. The threatened harm from disclosure is both clear and highly probable. Members and donors will leave the Aquarian Foundation if their link with the Foundation is publicized, and potential members and donors will be deterred from future association with the Foundation by the knowledge that the confidentiality promised by the Foundation is a Maginot Line which can be outflanked at any time by court-ordered discovery. This danger is not speculative, for it has already occurred. (JA 48a) The threats and incidents of violence directed at the Foundation amply justify the concerns of the members and donors.

The Court should also consider the interest of the State in providing a forum for the resolution of disputes

which will protect any litigant from unnecessary publicity, particularly where that publicity impinges upon fundamental constitutional rights, as both the trial court and the Washington Supreme Court recognized. (JA 54a, 128a)

The narrow scope of the protective order is also important. The order applies only to "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients or donors to any of the various plaintiffs." (JA 65a) The order does not prohibit the defendants from publishing any information about the Aquarian Foundation, but simply requires that the defendants have gleaned any published information from a source other than pre-trial discovery. (*Id.*) As interpreted by the Washington Supreme Court, the protective order is effective only "until and unless the fruits of the discovery are made public through the judicial process (or by the plaintiffs or others independently of discovery). . . ." (JA 131a) Thus, the protective order will ultimately protect only information produced during discovery not otherwise independently known by the defendants and never admitted at trial as relevant to the issues in the case. It is a gross misstatement to characterize the order as an "extraordinary burden imposed upon the defendants' constitutional rights." (AC BR 18)

No less restrictive alternative, other than denying discovery, will protect the rights of the members and donors of the Foundation. Publicizing this information will irrevocably compromise the privacy of the members and donors and will deter them and others from associating

with the Foundation. The Seattle Times suggests that a less restrictive alternative would be closer judicial supervision of the discovery process and narrower discovery. Reverend Rhinehart and the Foundation agree that narrower discovery would be appropriate in this case, but the trial court has already ordered disclosure of the information at issue here. (JA 58a)

The Seattle Times also suggests that any member or donor who feels aggrieved by disclosure of his or her association with the Foundation may seek judicial redress or police protection. (PET BR 45) This suggestion simply evidences the Seattle Times' consistent callous disregard for physical safety and psychological well-being of the members and donors of the Foundation. In any event, these proposed "less restrictive alternatives" would never serve to avoid the injuries feared, and are but pale palliatives for physical harm and relinquishment of free association and free exercise of the members' religious rights.

The Seattle Times complains that the protective order is deficient because the trial court did not enter formal findings of fact before imposing the protective order. (PET BR 36-39, AC BR 15-16) No formal findings are required.[8] In any event, the facts are undisputed and findings of fact would be superfluous. No one asserts that the Aquarian Foundation is a traditional mainstream

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[8]Petitioners rely on *Globe Newspaper Company v. Superior Court*, 457 U. S. 596, 608, n. 20 (1982), for this requirement. *Globe Newspapers* did not require formalized findings of fact, but simply called for a case by case individualized determination before denying public access to a criminal trial. *Globe Newspapers* in turn cited *Richmond Newspapers v. Virginia*, 448 U. S. 555, 581 (1980), which held that, "absent an over-

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denomination, or that it is well-received by the population at large. No one questions the Molotov cocktail hurled through the window of the church, or the two men who beat an elderly female member over the head with a shovel at the entry of the church. (JA 95a-96a)

The record here clearly shows that the trial court based its decision on the individual facts of the case before it, and articulated on the record the court's reasons for its ruling. The trial court adopted the *Halkin* criteria for evaluating the propriety of a protective order. (JA 78a-79a) The court rejected the Aquarian Foundation's initial motion for a protective order, referring to the insufficiency of conclusory allegations. (JA 79a) The trial court was then presented with affidavits describing with particularity the decline in membership suffered by the Aquarian Foundation since the opening salvo in the Seattle Times' campaign against the Foundation, and the specific incidents of violence and threats directed at the Aquarian Foundation. The trial court reviewed these affidavits, "considered the positions advanced by plaintiffs," considered the importance "of access to the court", and found that, "plaintiffs have reasonable grounds for the issuance of a protective order." (JA 64a-65a) Additional findings were not necessary.

The balance must be struck in favor of confidentiality. The protective order is valid and this Court should affirm the decision below.

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riding interest articulated in findings, the trial of a criminal case must be open to the public." Neither case supports the petitioners' argument that formalistic findings of fact are necessary.

C. The Protective Order Satisfies Even The "Close Scrutiny" Test Urged By Defendant Seattle Times.

The Seattle Times asks this Court to subject the protective order to the "close scrutiny" test developed by the District of Columbia Circuit. *In re Halkin*, 598 F. 2d 176, 186 (D. C. Cir. 1979); (PET BR 39-45). Amici curiae echo this suggestion, calling for the "strictest scrutiny" of protective orders. (AC BR 15)

The standard suggested by the Seattle Times ignores the significant first amendment rights of the members and donors. The Court has no occasion to address the "close scrutiny" standard in order to decide this case, for the rights of the members and donors must be balanced against the rights of the Seattle Times. However, in the event that the Court wishes to go beyond the facts of this case and decide the appropriate standard to use in determining the propriety of any protective order, we show here that this protective order satisfies even the "close scrutiny" to which the Seattle Times would subject it.

Neither the Seattle Times nor amici curiae label the protective order a prior restraint, nor do they contend that the protective order suffers from the "heavy presumption against . . . constitutional validity" suffered by a prior restraint. *New York Times Company v. United States*, 403 U. S. 713, 714 (1971). Defendants' reluctance to label this protective order a prior restraint is well-founded, since the protective order does not regulate or prohibit the content of defendants' publications, but simply requires that defendants must have a source independent of state compelled disclosure for any information which

they choose to publish.[9] Thus, the order differs drastically from prior restraints struck down by this Court in the past. *E. g., Nebraska Press Association v. Stuart,* 427 U. S. 539, 542 (1976) (order prohibiting anyone from releasing "for public dissemination in any form or manner whatsoever any testimony given or evidence adduced"); *Carroll v. Commissioners of Princess Anne,* 393 U. S. 175, 177 (1968) (order restrained petitioners from holding rallies or meetings in the county "which will tend to disturb and endanger the citizens of the county"); *New York Times Company v. United States,* 403 U. S. 713 (1971) (government sought to enjoin newspaper from publishing the contents of a classified document); *Near v. Minnesota,* 283 U. S. 697, 706 (1931) (judgment enjoining the defendants from publishing any publication "which is a malicious, scandalous or defamatory newspaper").

Even the "close scrutiny" test proposed by defendants is satisfied under the facts of this case. The Washington Supreme Court, although it disagreed with the strict prior restraint analysis of *Nebraska Press Association,* tested this protective order under that analysis and found that it was justified. (JA 105a) The Washington Supreme Court perceived no effective alternatives other than denial of discovery altogether, and concluded that the protective order would be effective. (JA 105a) The court then looked

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[9]Because the protective order permits the Seattle Times to publish any information learned independent of discovery, the order does not suffer the infirmity of the West Virginia statute which prohibited a newspaper from publishing the name of any youth charged as a juvenile offender, even if the newspaper obtained the information through lawful means independent of court sources. *Smith v. Daily Mail Publishing Co.,* 443 U. S. 97 (1979). *See also Landmark Communications Inc. v. Virginia,* 435 U. S. 829 (1978).

to the purposes for the protective order and the interests involved. The court considered the fact that protective orders "encourage full disclosure of all relevant facts so as to facilitate the administration of justice" (JA 109a), and considered the importance of the privacy rights of the members and donors of the Aquarian Foundation. (JA 110a-122a) The court balanced these interests against the "minimal" interests of the public in knowing the results of discovery (JA 128a-129a), and concluded that this protective order meets the "heavy burden" of justification. (JA 130a-131a)

The Seattle Times mischaracterizes the decision of the Washington Supreme Court as announcing "a *per se* rule that information which emerges in discovery should not be disseminated beyond the limited bounds absolutely necessary to prepare for trial." (PET BR 38) Amici curiae state with similar inaccuracy that the Washington Supreme Court has created "a presumption in favor of protective orders. . . ." (AC BR 18) The Washington Supreme Court did not create any presumption, but required a showing "that any of the harm spoken of in the rule is threatened and can be avoided without impeding the discovery process." (JA 130a) The Washington court further held that the trial court must weigh the respective interests of the parties.[10] (*Id.*)

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[10]The Seattle Times argues that it can disseminate discovery materials because it has "a substantial first amendment right to disseminate newsworthy information." (PET BR 10) Reverend Rhinehart and The Aquarian Foundation fully support the first amendment right of the Seattle Times or any other newspaper or person freely to print or to speak any facts they deem important. However, like any civilized person, Reverend

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This Court should hold that the balancing test is the proper standard for evaluating a protective order when dissemination would infringe significant constitutional rights of the party against whom discovery is sought. The "close scrutiny" test fails to consider the rights of the Reverend Rhinehart and the members and donors of the Aquarian Foundation. In any event, this protective order withstands even the "close scrutiny" to which the Seattle Times would have this Court subject it.

IV.

Any First Amendment Rights Implicated In Discovery Are Sufficiently Protected By The Good Cause Standard Of Washington's Civil Rule 26(c).

A. The Court May Condition Discovery Upon Restrictions On Dissemination Of The Information.

The protective order in this case should be evaluated under the balancing test discussed above. This Court need not consider the broader issue of the appropriate standard for evaluating a protective order where the party against whom discovery is sought cannot show any significant countervailing first amendment interest in restricting the

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Rhinehart and the members of the Foundation value a degree of privacy, and object to exposing everything about themselves to the curious public. They look forward to the opportunity to present their case against the Seattle Times in open court, and do not fear the scrutiny of cross-examination, for the public can learn the truth through the presentation of evidence by both sides. They object, however, to surrendering to a hostile newspaper confidential information which may never become relevant, and permitting the newspaper to publish selective bits and pieces of private information in a misleading fashion.

use of discovered information. The Washington Supreme Court, however, addressed the broader issue and concluded that the interest in an effective judicial system justified the use of the good cause standard of Washington Civil Rule 26(c). (JA 130a) If the Court reaches this broader issue, Reverend Rhinehart and the Aquarian Foundation urge the Court to adopt the good cause requirement as the appropriate test of the validity of a protective order.

Any first amendment interests which the litigants have in discovery materials are adequately protected by the requirement of Washington's Civil Rule 26(c) that a court may only enter a protective order "for good cause shown . . . which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Courts have inherent power to control their own proceedings in the pursuit of justice, and have full power to prohibit a party or that party's attorney from divulging otherwise private information divulged through the court's own processes. Moreover, the interest of any litigant or attorney to disseminate information learned through discovery is minimally protected by the first amendment, if at all. A litigant gains access to discovered information only through the court's own processes, and is no worse off under a protective order than the litigant would have been had discovery been denied altogether.

This court held in *Sheppard v. Maxwell*, 384 U. S. 333, 361 (1966), that a trial court has the power to proscribe extra-judicial statements by "any lawyer, party, witness or court official" which might jeopardize the defendant's right to a fair trial. The court reaffirmed the propriety of such measures in *Nebraska Press Ass'n*, 427 U. S. at

464. Indeed, Mr. Justice Brennan, concurring in *Nebraska Press Ass'n,* referred to the fiduciary responsibility of attorneys and court personnel not to obstruct the fair administration of justice:

> It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases. . . .

427 U. S. at 601 n. 27. More recently, the court again suggested that the State has the power to maintain the confidentiality of certain investigative proceedings and to punish State employees or witnesses for any breach of confidence. *Landmark Communications Inc. v. Virginia,* 435 U. S. 829, 837 n. 10 (1978). *See also Gulf Oil Co. v. Bernard,* 452 U. S. 89, 104 n. 21 (1981). The Second Circuit relied on this inherent power of the court in affirming a protective order in *International Products Corp. v. Koons,* 325 F. 2d 403, 407 (2d Cir. 1963) ("[W]e entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another through use of the court's processes.")

The Washington Supreme Court recognized the power of the court to control its own proceedings in order to protect legitimate expectations of privacy and to further "the State's vital interest in seeing that justice is administered upon all of the relevant facts, freely and truthfully disclosed by the parties." (JA 128a)

The objection most often raised to the exercise of the court's inherent power to control its own processes is that the State cannot condition a "benefit" (access to discoverable information) upon a waiver of constitutional rights

(first amendment right to free speech). *E.g., Halkin,* 598 F. 2d at 190; Marcus, *Myth and Reality in Protective Order Litigation,* 69 Cornell L. Rev. 1, 70 (1983). This objection is misdirected in the context of pretrial discovery. The impermissible "waiver" of constitutional rights occurs only when the State demands that a citizen relinquish some preexisting constitutional right in order to receive the State provided benefit. *E. g., Connick v. Myers,* 103 S. Ct. 1684 (1983); *Pickering v. Board of Education,* 391 U. S. 563, 568 (1968) (the State may not require teachers "to relinquish the first amendment rights they would otherwise enjoy as citizens . . ."). In these cases, the citizen received a "benefit" from the State. By contrast, when a court orders a private party to provide discovery, the State is not providing a "benefit" which belongs to the State—the court is ordering a private party to turn over private property, *i. e.,* information.

The lawsuit provides the only justification for compelling disclosure of the information. Absent the discovery order, the Aquarian Foundation has every right to refuse to disclose private information or to disclose it on whatever terms the Foundation chooses, including that the party receiving the information agree to keep the information confidential. The discovery order should not change matters. The court should be able to attach any condition to discovery which the Aquarian Foundation could have attached, so long as the basic purpose of discovery is not frustrated.

In the benefit/waiver cases, the State has no right to condition access to employment on constitutionally prohibited grounds, because the Bill of Rights precludes such

State action.[11] The Bill of Rights, however, does not prevent a private person from conditioning access to otherwise private information on a promise of confidentiality. The trial court here did no more than what the plaintiffs themselves had a right to do.

Court-ordered discovery also differs significantly from the benefit/waiver cases in that a litigant simply cannot disseminate confidential information known only to the adverse party until the court orders discovery. A litigant who obtains court-ordered discovery pursuant to a protective order does not "waive" or relinquish any meaningful first amendment right, because the litigant has no ability to disseminate the information unless the court orders discovery. In short, a litigant is not required to give up anything in order to obtain court ordered discovery. The litigant is undoubtedly better off with the discovery and has lost nothing by the operation of the protective order.

B. Civil Discovery Is Neither Presumptively Nor Historically Public.

First amendment interests in publicizing judicial proceedings are heightened in two situations. Where judicial proceedings have been open to the public, the State must meet a heavy burden in order to restrain public dissemination of information made public in those proceedings. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Additionally, the State bears a heavy burden in denying access

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[11] The benefit/waiver theory might prohibit the government from seeking a protective order, since information is being sought from the government, not from a private citizen. Thus, the *Halkin* majority's reliance on the benefit/waiver analysis may have been appropriate. 598 F. 2d at 190.

to criminal trials which have traditionally been open for centuries past. *Globe Newspaper Co. v. Superior Court, v. Superior Court,* 457 U.S. 596 (1982); *Richmond Newspapers Inc. v. Virginia,* 448 U.S. 555 (1980). This case does not implicate heightened first amendment interests because this discovery will not be conducted in public and discovery has not traditionally been a public proceeding.

The protective order was designed to protect information which has not yet even been produced. The protective order will prevent this information from becoming a matter of public record unless the information is admitted by a judge at trial. The protective order does not seal up information already made public and does not suffer from the defect which undermined the restraining order struck down in *Nebraska Press Ass'n.*

Civil discovery has never been conducted in public in the traditional manner of a criminal trial, and the principles of *Richmond Newspapers Inc.* and *Globe Newspaper Company* do not bestow on defendants any heightened first amendment interests. The "open trial" doctrine of *Richmond Newspapers Inc.* has never been extended beyond the context of criminal cases. *Globe Newspaper Co.,* 457 U.S. at 611 (O'Connor, J., concurring). Even within the context of criminal trials, pretrial proceedings have never been characterized by the same degree of openness as actual trials. *Gannett Company v. DePasquale,* 443 U.S. 368, 387 (1979).

The open trial doctrine of *Richmond Newspapers Inc., Globe Newspaper Company* and *Gannett Company* simply does not apply to civil discovery. The question is not whether civil discovery has traditionally been a public or

private judicial proceeding, but whether discovery under the civil rules is a "judicial proceeding" at all. Discovery actually occurs in private largely without judicial intervention, without public notice, and most discovered materials are not even filed with the court. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. at 11-15. Chief Justice Burger summarized the situation when he observed that, "[I]t has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants." *Gannett Company*, 443 U.S. at 396 (Burger, C. J. concurring).

Broad discovery as practiced under the contemporary Rules of Civil Procedure did not exist at the common law. Pleadings played a limited discovery role both in the common law courts and at equity. Discovery through the common law pleadings was inadequate, because factual allegations came to be replaced by statements of conclusions of law and fact which were sometimes fictitious and seldom revealed much about the substance of the controversy.[12] G. Ragland, Jr., *Discovery Before Trial* 1-2 (1932); Comment, *Developments in the Law—Discovery*, 74 Harv. L., Rev. 940, 946 (1961).

The scope of discovery at the common law was extremely limited. A party could only obtain discovery as

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[12]The primary significance of discovery through pleadings lay in the fact that the parties were incompetent to testify as witnesses in a case in which they were interested, either for or against each other. N. Fetter, *Fetter on Equity*, 320 1895; Millar, *The Mechanism of Fact—Discovery: A Study in Comparative Civil Procedure*, 32 Ill. L. Rev. 424, 442 (1937). Thus, the pleadings were the only way to present evidence of facts known only to the opponent.

to facts material to that party's own case. Fetter, *supra*, at 321; 2 J. Story, *Commentaries on Equity Jurisprudence* 822 (13th ed. 1886); W. Kerr, *Law of Discovery* 163 (1870). No discovery was permitted regarding evidence supporting the opponent's case, or how the opponent planned to meet the case of the discovering party. R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 214 (1952).

The limited scope of discovery was firmly entrenched at the time the Constitution was adopted. The drafters of the Federal Judiciary Act of September 24, 1789, proposed to expand the scope of discovery in the federal courts to require a defendant "to disclose on oath his or her knowledge in the cause." Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 95 (1923). The proposed expansion of the scope of discovery gave rise to heated debate:

> It was termed a clause carrying "inquisitorial powers" . . . "extorting evidence from any person was a species of torture, and inconsistent with the spirit of freedom;" and it was finally stricken out by the Senate, on motion of Patterson.

Id. at 95-96.

Parties could take depositions, not for discovery, but to preserve the testimony of a witness or to obtain the testimony of a witness who might not attend trial. P. Dyer-Smith, *Federal Examinations Before Trial and Depositions Practice*, 73, 464, 527 (1939). Such depositions were clearly not public proceedings. Indeed, depositions were taken in secret on interrogatories submitted by the parties, and the parties themselves were not even permitted to

attend. Langdell, *Summary of Equity Pleading*, §§ 56, 59, 161, 171, 172 (1877), quoted in J. Wigmore, *Wigmore on Evidence* § 1846 (2d ed. 1923); R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 36-37, 270-71 (1952). The parties themselves did not even have access to the substance of the deposition testimony until all witnesses had been examined, at which time the depositions could be published. 3 W. Blackstone, *Commentaries* *450. Indeed, there was no assurance that a deposition would ever be published at all. 2 J. Story, *Commentaries on Equity Jurisprudence* 838 (13th ed. 1886).

The first Congress did not regard discovery as a public matter imbued with first amendment interests. The first Congress incorporated the common law tradition of sealed depositions into the Federal Judiciary Act of 1789, chapter XX, § 30, 1 Stat. 88-89. The Act was passed on September 24, 1789. The first ten amendments to the Constitution were submitted to the states by resolution passed by Congress a few days afterwards:

> [I]t is hardly logical that Congress would create the right of privacy in depositions September 24, 1789 (the date of approval of the Judiciary Act by the President) and ask the states to destroy that right the next day or so.

Times News Limited (G. Britain) v. McDonnell-Douglass Corp., 387 F. Supp. 189, 195 (C.D. Cal. 1974).

The traditional common law rule that depositions were not public was forcefully stated in *United States v. United Shoe Machinery*, 198 Fed. 870 (D. Mass. 1912). One of the parties sought to admit public and press to depositions. The trial court refused, distinguishing between judicial proceedings and depositions. In response to the holding

of *United Shoe Machinery*, the attorney general asked Congress to change the common law rule by enacting the proposed Publicity in Taking Evidence Act of 1913, 15 U. S. C. § 30 (1973), providing that depositions in antitrust suits brought by the United States "shall be open to the public as freely as are trial in open court." Marcus, *supra*, 69 Cornell L. Rev. at 38-39. The sponsor of the bill acknowledged that the trial court had correctly decided *United Shoe Machinery*, but argued that the law should be changed to enhance the enforcement of the Sherman Act. 49 Cong. Rec. 4621-22 (1913).

Washington adheres to the traditional common law practice that depositions are not matters of public record.[13] (JA 118a) Discovery in Washington is neither public nor imbued with first amendment interests. The good cause standard of Washington's Civil Rule 26(c) adequately safeguards any minimal first amendment interests in discovery.

C. The Good Cause Standard Will Preserve Access To The Courts, Without Which Any Constitutional Right Is A Hollow Shell.

Any heightened standard for protective orders will chill potential litigants from exercising their right of access to the court system. The price of seeking redress in the courts should not be the unrestricted dissemination of

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[13]Amici curiae argue that the State of Washington would interpret its discovery rules consistent with the federal rules, which amici assert to have been interpreted to hold that discovery is open to the public. (AC BR 6-7) Whatever the rule may be in federal courts, the Washington Supreme Court stated in this case that depositions are not public in this State. (JA 118a) The Washington Supreme Court has interpreted its own court rule, and this Court has no further occasion to construe Washington's rule in light of the similar federal rule.

private information about the claimant obtained through court-compelled discovery. A defendant who is forced into litigation should not be required to choose between abandoning defense of the claim or relinquishing any right to privacy in discoverable information. The good cause standard adopted by the Washington Supreme Court preserves free access to the courts. No constitutional right is safe without effective access to the courts, which, under our system of government, are the ultimate interpreters and guardians of these rights. *Marbury v. Madison,* 1 Cranch 137 (1803).

The ultimate resolution of the constitutionality of protective orders must turn in the final analysis upon a pragmatic assessment of the functioning of the judicial system, rather than upon resort to historical analysis or the mechanical application of first amendment phrases or formula devised to meet problems altogether different from the issues presented here. First amendment analysis does not proceed by talismanic tests but through "a pragmatic assessment of its operation in the particular circumstances." *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 442 (1957) (quoting P. Freund, *The Supreme Court and Civil Liberties,* 4 Vand. L. Rev. 533, 539). Discovery simply cannot function without protective orders. While commentators may disagree on the proper scope of discovery, discovery of relevant information is necessary for an effective judicial system. *Herbert v. Lando,* 441 U.S. 153, 179 (1979); *Hickman v. Taylor,* 329 U.S. 495, 501, 507 (1947). And without an effectively functioning judiciary, no constitutional right is safe, neither free speech, free press, free exercise of religion, privacy, association nor access to the courts. This bedrock reality demands that

courts be permitted to enter protective orders on a showing of good cause, without any presumption against their use and without the burden of the "close scrutiny" or "strict scrutiny" urged by defendants and amici curiae.

This is not a "newspaper" case dealing with the rights of the press to attend and report on judicial proceedings. The Seattle Times is an ordinary litigant here, and has no greater first amendment rights in resisting this protective order than would any other litigant. The Seattle Times has no monopoly on the first amendment nor any rights to obtain and disseminate information superior to that of the general public. *First National Bank of Boston v. Bellotti,* 435 U. S. 765, 781-82 (1978) and 435 U. S. 795-802 (Burger, C. J., concurring); *Nixon v. Warner Communications, Inc.,* 435 U. S. 589, 609 (1978); *Saxbe v. Washington Post Company,* 417 U. S. 843, 850 (1974).

Attorneys and judges deal with the discovery process every day, and tend to forget that litigants are often justifiably shocked and humiliated when they are forced to reveal the most intimate aspects of their lives and to lay bare their most closely guarded secrets in return for the privilege of settling disputes within the court system. *Cf.* Rifkind, *Are We Asking Too Much of Our Courts?* 70 F. R. D. 96, 107 ("A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.") Intrusive discovery can be a powerful club to force a litigant into an unfavorable settlement, or even to relinquish just claims. Such intrusive discovery can be all the more abusive where, as here, the plaintiffs' claims are based upon an invasion of privacy

and false or misleading publications.[14] Both the trial court and the Washington Supreme Court recognized that potential litigants would be deterred from using the courts if the confidentiality of private information could not be guarded by protective orders. (JA 54a, 128a)

The most critical function of free speech in our society is to ensure the effective functioning of a free society. That great purpose must not be frustrated by constructing a first amendment doctrine which undermines the judicial system and frustrates the ends of justice:

> The ultimate public concern is not the satisfaction of curiosity or an abstract "right to know". Rather it is the assurance that trials are in fact fair and according to law.
>
> As the discourse on how best to reconcile these great constitutional rights continues, it is well to remember that it is only by assuring that justice is done to individuals from day to day that we can assure that all of our freedoms, including free press, are preserved through the years to come.

Powell, *The Right to a Fair Trial*, 51 A.B.A.J. 534, 538 (1965).

The good cause standard adequately protects any limited first amendment interest in discovery materials. Any more stringent standard, such as the defendants' proposed "close scrutiny" test, would unnecessarily burden a litigant's access to the courts to no apparent advantage. This Court should adhere to the good cause standard adopted by the Washington Supreme Court.

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[14]Even Jeremy Bentham, otherwise a vigorous proponent of publicity, J. Bentham, *Bentham's Judicial Evidence*, 67 et seq. (1825), came to recognize the propriety of confidential pretrial discovery for purposes of protecting privacy and reputation. J. Bentham, *Bentham's Rationale of Judicial Evidence*, 550, 553-54 (1827).

CONCLUSION

The discovery ordered here infringes Reverend Rhinehart's and the Aquarian Foundation members' and donors' first amendment rights to freedom of association, religion, privacy, and access to the courts. The first amendment requires the court to minimize this impact through a protective order prohibiting public dissemination of this confidential information. The protective order should be evaluated by balancing the rights of Reverend Rhinehart and the members and donors of the Aquarian Foundation against the limited interest of the Seattle Times in publicizing the information. This Court need not address the broader issue of the proper standard to use in evaluating a protective order where the party providing discovery does not assert any constitutional right to preserve the confidentiality of the discovered information. If the Court chooses to decide the broader issue, the Court should adhere to the good cause standard adopted by the Washington Supreme Court.

For these reasons, the judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted

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December 16, 1983

APPENDIX A

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 80-2-02460-4

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978.

Plaintiffs,

v.

THE SEATTLE TIMES, a Delaware Corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITUS AND JANE DOE LACITIS; JOHN WILSON AND REBECCA KAREN WILSON; JOHN MCCOY AND KAREN MCCOY,

Defendants.

PROTECTIVE ORDER

THIS MATTER having come on upon the motion of the plaintiffs for a protective order, and the court having reviewed the affidavits of Marilou McIntyre, Linda Dunn, Robert Plante, Gillene Avalos, and Catherine Harold, and the court having considered the positions advanced by plaintiffs • • • and the court having considered that the absence of protective orders would have a chilling effect on a person's willingness to bring a case to court and that this would have the effect of denying persons access to the courts, and the court being fully advised, NOW, THERE-

FORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Plaintiffs have reasonable grounds for the issuance of a protective order.

2. Plaintiffs' motion for a protective order is granted with respect to information gained by the defendants through the use of all of the discovery processes regarding the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs.

3. The defendants and each of them shall make no use of and shall not disseminate the information defined in paragraph 2 which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes.

4. Defendants' motion for a stay is denied.

June 26, 1981.

/s/ JACK P. SCHOLFIELD, Judge
Jack P. Scholfield, Judge
King County Superior Court

Presented by:

EDWARDS AND BARBIERI

By /s/ MALCOLM L. EDWARDS
Malcolm L. Edwards
Attorneys for Plaintiffs